IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. ~~76-81~~ 76-407

MIRIAM WINTERS,

Appellant,

-against-

THE COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES, State of New York, and THE NEW YORK CITY COMMISSIONER OF SOCIAL SERVICES,

Appellees.

JURISDICTIONAL STATEMENT

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No. _____

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MIRIAM WINTERS,

Appellant,

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THE COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES, State of New York, and the NEW YORK CITY COMMISSIONER OF SOCIAL SERVICES,

Appellees.

JURISDICTIONAL STATEMENT

The Appellant, MIRIAM WINTERS, respectfully prays that the Supreme Court note jurisdiction and accept her case for oral argument.

OPINION BELOW

There was no reported opinion of the Court of Appeals of the State of New York, but a dismissal of the appeal, sua sponte. The relevant opinion of the Appellate Division of the New York Supreme Court is reported in the Appendix.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on April 29, 1976. The Notice of Appeal to the Court of Appeals of New York was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(2). This action was originally brought to challenge the constitutionality of Appellee's decision not to reimburse Appellant for the cost of Christian Science nursing care. Appellant believes that an interpretation of §365-a of the New York So-

cial Services Law (Appendix, A-19) which mandates this result is violative of Appellant's First Amendment right of freedom or religion.

If this case has been improperly brought on appeal, Appellant desires that the Court consider the same as a petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Can New York constitutionally withhold reimbursement of the cost of Christian Science nursing care from a Christian Science Medicaid participant where such reimbursement would be granted for other nurses rendering comparable care?

2. Is Appellant entitled to reimbursement of the cost of Christian Science nursing care under New York law?

STATEMENT OF THE CASE

Appellant, MIRIAM WINTERS, has been a follower of Christian Science belief and practices for over twelve years. In 1973, when she became ill, she called upon a Christian Science practitioner and nurse for treatment. Since Appellant is eligible for Medicaid assistance, she requested reimbursement of $79.08 for the professional services rendered. This request was denied by the New York City Department of Social Services (hereinafter called the Agency).

At a hearing on December 18, 1973, Appellant contested the Agency's denial of payment for the cost of Christian Science nursing care. The resultant decision (attached as Appendix A- 5) rejected Appellant's claim for reimbursement on the asserted grounds that there is no provision in the Social Services Law or Departmental Regulations authorizing payment for the cost

of such treatment by Christian Science nurses.

Appellant then sought review in the Appellate Division of the New York Supreme Court. The Agency's decision was affirmed. The Appellate Division, however, refused to consider the constitutional questions raised by Appellant. Instead, they rejected the request for reimbursement on the basis of Appellant's alleged failure to describe with sufficient specificity, the medical services provided her (Appendix, A- 1).*

The Court of Appeals dismissed Appellant's case sua sponte, on the ground that no substantial constitutional question was directly involved. The Court of Appeals accepted no briefs, nor did they hear

*The Appellate Division raised this issue for the first time in any of the proceedings.

oral argument on any of the issues. They came to their decision despite notice that Appellant's constitutional claims, involving the same claim for reimbursement and other instances of rejection of Christian Science reimbusement, were being considered by a duly convened three-judge district court.

Appellant's case in the three-judge district court is still pending in the Eastern District of New York. Should that court rule adversely to Appellant, she intends to move to consolidate her appeal from the federal court with the instant appeal.

Both in the Appellate Division and the Court of Appeals, Appellant raised the issue that denial of Medicaid reimbursement for the cost of Christian Science nursing care abridged her constitutional right of freedom of religion.

I

APPELLANT'S CLAIM IS WITHIN THE COVERAGE OF §365-a.

While the Appellate Division implied that Appellant's claim could have been denied because she failed to present evidence indicating "the nature of her illness or the treatment which she received," (Appendix, A- 4), (although the hearing officer explicitly relied on a different reason) §365-a is written in terms only of repayment for "services and supplies which are necessary ... to correct or cure conditions in the person that cause acute suffering (emphasis added) ...," and Appellant's affidavit, unchallenged and fully accepted in evidence, establishes just those elements. In the third and fourth paragraphs of the affidavit Appellant sets out the facts of her illness and discomfort and establishes her reliance on and use of Christian Science services for ultimate relief. These

facts were precisely the elements required by the hearing examiner and the Commissioner in their application of §365-a; any added burdens of medical specificity attached by the Appellate Division were extraneous to the statutory requirements and thus improper grounds for the Appellate Division's decision.*

The Appellate Division's denial of Appellant's claim rested mainly on the fact that Appellant's nurse, like all other Christian Science nurses," ...is not a registered nurse (Education Law §6901 et seq.)." Section 365-a2(d), however, authorizes the cost of "home health

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*On this point, 18 N.Y.C.R.R. §540.7 is worthwhile to note. Although N.Y.C.R.R. does not contain rules directly on Appellant's claim, §540.7 does set out what must be shown by a provider for collection of payment for medical services rendered. Appellant's evidence satisfied the substantive provisions of this section except for giving the provider's Social Security number (which she was unable to obtain).

care services, including home nursing services," without regard to who provides those services.* Of course, the requirement that the provider be qualified is perhaps implicit in the statute as it concerns "medical assistance," but no challenge was made to the quality of service provided the Appellant, and, as the evidence presented to the Appellate Division shows,

Christian Science nurses do have practical nursing training and are qualified to perform at least the medically required services rendered Appellant. Further, New York law recognizes the qualifications of Christian Science nurses and the rights of patients to choose Christian Science care.

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*See also 18 N.Y.C.R.R. §360.29 and 45 CFR 249.10(b)(15)(ii) insuring recipient's free choice of providers and a previous decision of the Commissioner of the Department of Social Services that awarded Appellant reimbursement for the cost of medical services provided her by a Christian Science practitioner (Appendix, A-).

In the same Education Law on which the Appellate Division relied, §6907.1-g prohibits a construction of that article's provisions that interfere with Christian Science practices.(1)

Thus, any judicially implemented requirement that home nursing services be provided by a registered nurse to satisfy a §365-a claim is not justified by the statute, its purposes, or the Education Law insofar as it regulates the qualifications of practicing nurses. Rather, 18 N.Y.C.R.R. §360.29 and §6907.1-g must be read in conjunction to authorize Appellant's claim. Any other construction of New York law is improper not only in light of the State's recognition of Christian Science practices but also in recognition of the

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(1)"... the care of the sick when done in connection with the practice of the religious tenets of any church."

First Amendment's commands.

If the Appellate Division did not mean to require that Appellant's nurse herself be registered but only that there be supervision by a registered nurse, that requirement is improperly applied also, as Appellant's nursing care was under the supervision of her Christian Science practitioner whose services the Department of Social Services has already recognized (See Note, p. 15 (infra).

The last clause of §365-a2(d) does require that some of the services discussed in the section under the supervision of a registered nurse to be reimbursable, but this qualification does not apply to Appellant's claim for payments for nursing services. The supervision requirements were enacted and attached to the authorization of nursing services reimbursements in the context of an amendment to §365-a2(d) adding "homemaker and housekeeping services" to

the section's coverage. The supervision requirement logically qualifies claims for reimbursement for the cost of housekeeping services to insure that they are pursuant to a legitimate medical purpose and plan. Such insurance is obviously unnecessary as regards nursing care, however, as it has no benefit to a recipient except as an element of a recovery plan. To apply the clause to Appellant's claim would be utterly absurd: Appellant has already shown that New York considers Christian Science nursing care legally comparable to that of a registered nurse under the Education Law and thus would have no reason to require supervision. It should be noted that Christian Science nursing care is almost never rendered under or qualified by such supervision (which itself might infringe upon First Amendment freedom).

The Department of Social Services also understood the supervision requirement

not to apply to home nursing services. The rules concerning those services, 18 N.Y.C. R.R. §505.8 make no mention or even suggestion of any sort of supervision requirement. The Department recognizes that §365-a(2) and subsection (d) placed no particular restrictions on one's choice of suppliers of "home nursing services" and wisely the Department refrained from adding any extraneous restrictions of its own. And, of course, recipients of medical assistance have a "free choice of providers." 18 N.Y.C.R.R. 360.29, 45 CFR 249.10(b)(15)(ii).

Both the hearing examiner and Commissioner realized that Appellant established a sufficient claim for reimbursement. She was in need of nursing care and received the same from a qualified nurse: by both the law of New York and the Code of Rules and Regulations of the Department of Social Services these facts alone establish her right to reimbursement.

II

INTERPRETING §365-a TO EXCLUDE REIMBURSEMENT FOR QUALIFIED CHRISTIAN SCIENCE NURSING CARE VIOLATES THE FIRST AMENDMENT.

A stated purpose of New York's Medicaid Program is to provide payment of part or all the costs of "care, services, and supplies which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity ..." §365-a. To insure that the Medicaid patient receives the care that he or she personally needs, New York regulations guarantee a free choice of institution, agency or person providing such care. 18 N.Y.C. R.R. §360.29. (Further, the Education Law provides that Christian Science nurses and adherents should not be discriminated against in the regulation of nursing care. §6907.1-g.)[2]

Appellant was in great pain and in need of medical services; to read the law to disallow her repayment of costs for the services she received simply because she turned to a Christian Science nurse rather than a traditional nurse violates the First Amendment's guarantee of religious freedom, the equal protection clause of the Fourteenth Amendment, New York's Education Law §6907.1-g and the state and federal regulations, 18 N.Y.C.R.R. §360.29 and 45 CFR 249.11, guaranteeing her free choice of provider.

As a Christian Scientist, Appellant could not have accepted traditional medical treatment from a conventional nurse without violating a cardinal principle of her faith.

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(2) Indeed, a previous administrative decision by the Welfare Department held that there should be reimbursement for a payment for a Christian Science practitioner. See Appendix, A-16. See also 45 CFR 249.10(b)(15)(ii).

See her landmark federal case Winters v. Miller, 446 F.2d 65 (1971). Thus, the Appellate Division's interpretation of §365-a effectively conditions Appellant's participation in New York's Medicaid Program on her sacrificing her religious principles. The Supreme Court, however, has rejected the constitutionality of just this sort of conditioning. In Sherbert v. Verner, 374 U.S. 398 (1963), the Appellant was denied unemployment insurance benefits because she rejected any employment requiring work on Saturday, her religious sabbath as a Seventh Day Adventist. The South Carolina state courts found that she was disqualified from receiving the benefits because her rejection of Saturday work was without good cause, but the Supreme Court viewed the issue differently and held that "to condition the availability of benefits upon this Appellant's willingness to violate a cardinal principle of her faith effectively pen-

alizes the free exercise of her constitutional liberties." 374 U.S. at 406. Further, the Court pointed out that such a penalizing condition violates the Constitution regardless of any sort of right-privileged dichotomy:

> Nor may the South Carolina Court's construction of the statute be saved from constitutional infirmity on the grounds that benefits are not Appellant's 'right,' but merely 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege. 374 U.S. at 404, 405.

Certainly the Appellate Division's construction of §365-a produces a penalty at least as grievous as that rejected Verner. By excluding Christian Science nursing care from the coverage of §365-a, the lower court essentially places a needy and eligible Medicaid participant in an intolerable dilemma: Appellant must either

do without any sort of medical assistance at all, or she must contravene the most basic tenet of her religious beliefs. The statute must be interpreted so as to allow the Appellant's participation in the services provided by the State without constraining her religious freedom. "Once we find that a statute operates reasonably in dispensing benefits and is not defined by religion, freedom dictates that it be applied equally to those who mix religion in with the conditions of benefit." Weiss, Privilege, Posture and Protection, "Religion" in the Law, 73 Yale Law Journal, 593 at 615 (1964).

III

THE APPELLATE DIVISION RULED INCORRECTLY ON THE SUFFICIENCY OF APPELLANT'S EVIDENCE BY DENYING THE EXISTENCE OF UNDISPUTED FACTS.

In their memorandum decision, the Appellate Division of the Supreme Court found that:

> "[P]etitioner has not demonstrated that she is entitled to payments pursuant to Social Services Law §365-a, since there is insufficient in the record to indicate either the nature of her illness or of the treatment which she received." (See Appendix, A- 4.)

As grounds for affirming the decision of the Commissioner of the Department of Social Services, this finding is inappropriate and outside the scope of appellate review. This Court noted in Security and Exchange Commission v. Chenery Corp., 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed 1995 (1947), there is:

> ... "a simple but fundamental rule of administrative law ... to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."

Until the Appellate Division raised the question, there had never been any dispute as to the fact of Appellant's illness or the nature of her treatment. At the Department of Social Services' hearing, Appellant introduced as evidence her bill for Christian Science nursing care (Appendix, A(12-13) and an affidavit (Appendix, A-14) establishing her need for that nursing care. Among other things, the bill verified that nursing services were received by the Appellant, gave the name of the provider nurse, gave the date of the services, and detailed the charges. The Decision After Fair Hearing of the Department of Social Services did not even suggest that Appellant's claim for reimbursement was supported by insufficient evidence. If the Appellate Division meant to suggest in its decision that Appellant failed to establish the fact of her illness and treatment, the contention is absurd in the face of the

Hearing record.

If, in any way, the decision implies that Appellant's illness and treatment were handled under religious procedures which were inadequately described in medical terminology, then the Appellate Division has glossed over issues of a grave constitutional nature. These medical terms are specifically rejected by Appellant and fellow Christian Scientists as irrelevant and contrary to their religious beliefs. In light of her First Amendment rights, Appellant should not be forced to define her religion's hearing practices in terms of Materia Medica, when it is the rejection of these notions which forms the essence of her religious practices.*

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*Many perspectives can be brought to bear simultaneously on an act so that it can be both "religious" and "medical" from the point of view of the religious person and the medical person. Here the state pays for healing of all sorts. To exclude a particular method of healing because it is also characterized as "religious" violates the First Amendment. So too would forcing the

Appellant was ill; she was treated. She paid for this treatment and seeks reimbursement. The Department of Social Services' Hearing Officer accepted these facts as undisputed, he ruled on their basis, so that it is impossible now to deny their existence. No more detailed evidence was needed nor requested. The decision must be reviewed and reversed.

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religious person to characterize her healing process in a way considered a violation of her religion. See Weiss, Privilege, Posture and Protection, "Religion" in the Law, 73 Yale Law Journal 593, particularly at 603-606 (1964).

CONCLUSION

For these reasons, the Court should note jurisdiction and accept the case for oral argument.

Respectfully submitted,

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Dated: NEW YORK, NEW YORK
July 19, 1976

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Markewich, J.P., Lupiano, Tilzer, Capozzoli, Lane, JJ.

983

MIRIAM WINTERS,

Petitioner, J.A. Weiss

-against-

THE COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET ANO.,

Respondents. M.Weinberg

Determination of the respondent State Commissioner of Social Services dated February 20, 1974, which after a fair hearing affirmed a determination of the New York City Department of Social Services denying petitioner's requests for (1) an increase in shelter allowance retroactive to June, 1971 and (2) for the payment of the cost of Christian Science nursing care, unanimously modified on the law to grant the shelter allowance increase retroactive to June 1971 and as so modified the determination is confirmed without costs or disbursements.

The hearing officer found that prior to June of 1971 petitioner received a shelter allowance of $140, which amount was equal to the actual rent then being paid. It was also found that in June of 1971 petitioner's actual rent was increased to $154.20 per month and that there was a further increase in February of 1973 to $160 per month. Although it was found that the petitioner was entitled to a shelter allowance equal to the actual rent being paid by her, there being no evidence to show that such amount was in excess of respondents' rent schedules, nevertheless, the increase in shelter allowance was made retroactive only to June of 1973, when the application for increase was brought, rather than to June 1971 when the increased costs were first incurred. The determination was based upon a finding that petitioner fail-

ed to make a timely request for a hearing in accordance with Social Services Law §135-a. That section provides that a request for a fair hearing "must be made within 60 days after the date of the action or failure to act complained of." However, there is nothing in this record to indicate that petitioner did not comply with that time limitation. Under the respondents' version of the facts, the first application for a shelter increase was made in June of 1973. When that application was denied, petitioner, in August of 1973, requested a fair hearing and that was well within the 60 day time period. If the petitioner's version of the facts is accepted, the request for a fair hearing was also timely. According to the petitioner, she made numerous requests for an increase prior to June 1973. However, prior to June 1973, she never received written notice of the Agency's adverse determination nor was she

informed of her right to a fair hearing. In the absence of such notification, it cannot be said that the 60 day period started to run (Kantanas v. Wyman, 38 A D 2d 849).

However, the request for the payment of the cost of Christian Science nursing care was properly denied. Aside from the fact that a Christian Science nurse is not classified as a registered nurse (Education Law §6901 et seq.), petitioner has not demonstrated that she is entitled to payments pursuant to Social Services Law §365-a, since there is insufficient in the record to indicate either the nature of her illness or of the treatment which she received.

Order filed.

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of MIRIAM WINTERS,	DECISION AFTER FAIR HEARING
From a Determination by the New York City Department of Social Services (hereinafter called the Agency).	

A fair hearing was held at Two World Trade Center, New York, New York, on December 18, 1973, before William Carr, Hearing Officer, at which the appellant's representative and representatives of the Agency appeared. The appeal is from a determination by the Agency relating to the adequacy of a grant of aid to the disabled and medical assistance authorization. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) The appellant is in receipt of a grant of aid to the disabled and medical

assistance authorization.

(2) The appellant is currently receiving a shelter allowance of $140 per month. Prior to June of 1971, the appellant's shelter cost was $140 per month. From June, 1971 to February, 1973, the appellant's shelter cost was $154.20 per month. From February, 1973 to date, the appellant's shelter cost has been $160 monthly. In addition to the shelter cost paid by the appellant the appellant pays an additional $30 per year surcharge for the use of an air conditioner. The appellant has requested that the Agency increase her shelter allowance retroactively and include, therein, the air conditioner surcharge. The Agency has denied these requests. The appellant's request was made in August of 1973.

(3) The appellant has requested the Agency make provision for the payment of the cost of Christian Science nursing care. The

Agency denied the request.

(4) The appellant requested a special grant or medical assistance authorization for the purchase of vaseline lotion, slippers and a robe recommended by the Christian Science nurse, and the appellant has also requested payment of transportation costs for shopping trips to purchase medical supplies. The Agency has denied both of these requests.

Pursuant to the provisions of Section 352.3 of the Regulations of the State Department of Social Services, each social services district is required to provide a shelter allowance in the amount actually paid but not in excess of the Agency's maximum pursuant to its rent schedule. The Agency submitted no evidence to establish that the appellant's current rental is in excess of that allowable under its schedule. Accordingly, the Agency is required to increase the appellant's shelter allowance retroactively to June of 1973.

With respect to the appellant's request that her shelter be increased retroactively to June of 1971, Section 135-a of the Social Services Law provides that a request for a fair hearing must be made within 60 days of the date of the Agency's action or failure to act. Accordingly, the adequacy of the appellant's rent allowance retroactive to June of 1971 is no longer subject to review. Additionally, there is no provision under the Social Services Law or Departmental Regulations for the Agency to issue a special grant for the rental of an air conditioner.

With respect to the appellant's request that the Agency make provision for the cost of Christian Science nursing care, there is no provision in the Social Services Law or Departmental Regulations to authorize such as an item of public assistance. Additionally, there is no provision under the

medical assistance provisions of the Social Services Law or the Departmental Regulations which would allow the Agency to authorize this care as an item of medical assistance (Section 365-a.2 of the Social Services Law). Accordingly, the Agency properly denied this request of the appellant.

With respect to the appellant's request for the payment of the cost of vaseline lotion, slippers and a robe, the determination of the Agency to deny such request was also proper. There is no provision which would authorize payment for these items as they are not items of medical need (Section 505.3 of the Regulations). Such items are covered by the appellant's basic needs allowance, and there is no provision for issuance of a special grant to purchase same. Accordingly, the Agency properly denied the request of the appellant for the aforementioned items.

Although there is provision in the

Social Services Law and Regulations to meet the cost of transportation to receive medical treatment, there is no provision which would cover the cost of shopping trips to obtain medical supplies. Accordingly, the Agency properly determined to deny the appellant's request for transportation to obtain medical supplies.

DECISION: The determinations of the Agency denying payment for rental of an air conditioner, the services of a Christian Science nurse, the cost of vaseline lotion, slippers and a robe and the transportation cost incidental to purchase medical supplies are affirmed. The determination of the Agency relative to the appellant's current shelter allowance is not and cannot be affirmed and the Agency is directed to increase the appellant's shelter allowance retroactive to June of 1973. The appellant's request for a retroactive shelter allowance to June of 1971, is not sub-

ject to review. The Agency is directed to take appropriate action in accordance with the foregoing decision pursuant to the provisions of Section 358.22 of the State Department of Social Services.

Dated: Albany, New York

ABE LAVINE
Commissioner

BY:

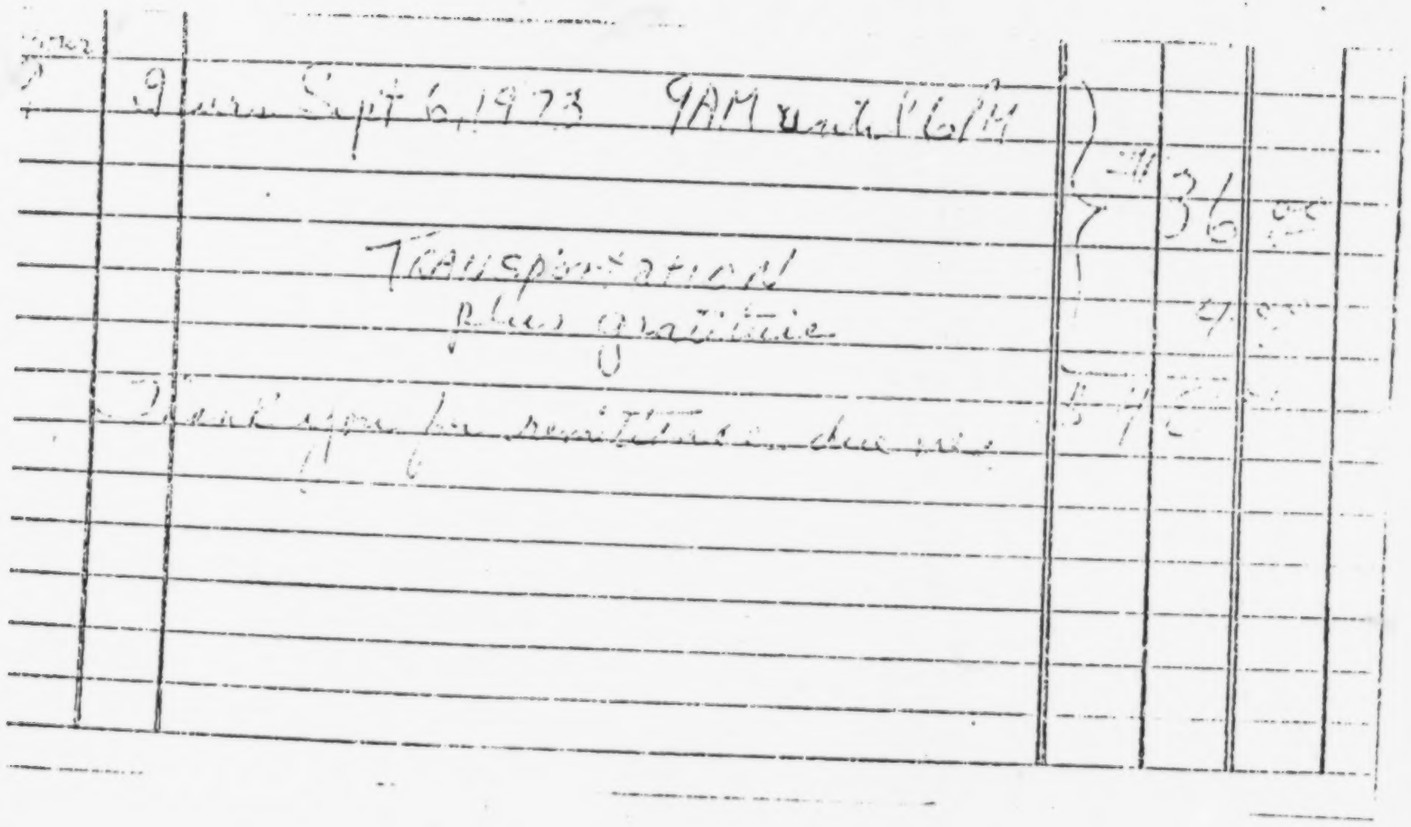
CARMEN SHANG
Assistant Commissioner

FROM MRS [illegible] Keane [illegible] 212 525-[illegible]
13?-39 166th Place Jamaica, N.Y. 11434

Sept 6 1973

TO Miss. Miriam Winters Rm 925 RE:
ADDRESS St. Geo. Hotel 51 Clark St — Re: Nursing Care
CITY B'klyn, N.Y. + shopping for clothing + nursing supplies
TERMS [illegible]

BEST COPY AVAILABLE



STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MIRIAM WINTERS, being duly sworn, deposes and says:

I have relied upon Christian Science for over twelve years.

I believe that their teachings are the only way to ensure good health and are certainly the only way which I can continue with spiritual and mental well-being.

Recently, I became ill. I called on my Christian Science practitioner and used the services of a Christian Science nurse for one day. The Christian Science bought supplies for my comfort.

Thanks to Christian Science treatment, I became healed.

I live only on the inadequate money that welfare gives me.

Christian Science treatment consists and is recognized by the U.S. Government and by certain insurance companies and should be

paid for by Medicaid or by a special grant. All crossing out and corrections have been done by Miriam Winters.

MIRIAM WINTERS

Sworn to before me this
day of December, 1973

NOTARY PUBLIC

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of MIRIAM WINTERS from a determination by the New York City Department of Social Services (hereinafter called the agency)	DECISION AFTER FAIR HEARING

A fair hearing was held at 2 World Trade Center, New York, New York on March 7, 1974 before John Burke, Hearing Officer, at which the appellant and representatives of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of medical assistance. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) The appellant, who lives alone,

was a recipient of aid to the disabled up until December 31, 1973. Appellant also has full medical assistance coverage.

(2) The appellant on August 26, 1973, and September 18, and 21, 1973, was treated by a Christian Science practitioner, and has received a bill for $70.00 for such treatment.

(3) The appellant is practicing Christian Scientist.

(4) The appellant's request for payment of the aforesaid bill was denied by the agency.

(5) At the hearing, the agency stipulated that the appellant has a choice of a practitioner is duly recognized as a Christian Scientist.

The record establishes that Benjamin Rippe is registered as a Christian Scientist practitioner at 26 Court Street in Brooklyn, and therefore, the appellant is entitled to be reimburse for the treat-

ment so billed.

DECISION: The determination of the agency is not and cannot be affirmed. The agency is directed to take appropriate action in accordance with the foregoing decision pursuant to the provisions of Section 358.22 of the Regulations of the State Department of Social Services.

DATED: Albany, New York
May 27, 1974

ABE LAVINE
Commissioner

BY: CARMAN SHANG
Assistant Commissioner

1. The amount, nature and manner of providing medical assistance for needy persons shall be determined by the public welfare official with the advice of a physician and in accordance with the local medical plan, this title, and the regulations of the department.

2. "Medical assistance" shall mean payment of part or all of the cost of care, services and supplies which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title, and the regulations of the depart-

ment. Such care, services and supplies shall include, but need not be limited to:

(a) services of qualified physicians, dentists to the extent authorized by paragraph (e) herein, nurses, optometrists, podiatrists and other related professional personnel.

* * * *

(d) home health care services, including home nursing services and services of home aids;*

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*Subdivision 2, paragraph (d) was subsequently amended, Laws 1973, Chapter 595, §1, effective June 11, 1973.

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MIRIAM WINTERS, Appellant, -against- THE COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES, State of New York and the NEW YORK CITY COMMISSIONER OF SOCIAL SERVICES, Appellees	

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that MIRIAM WINTERS, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of New York State entered on April 29, 1976, dismissing the above named appeal. Appeal to the United States Supreme Court is taken pursuant to 28 U.S.C. §1257(2).

JONATHAN A. WEISS
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Attorney for Appellant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-81

MIRIAM WINTERS,

Appellant,

against

THE COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES, STATE OF NEW YORK and THE NEW YORK CITY COMMISSIONER OF SOCIAL SERVICES,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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CASES CITED

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-81

Miriam Winters,

Appellant,

against

The Commissioner of the Department of Social Services, State of New York and The New York City Commissioner of Social Services,

Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

Appellee Commissioner of the New York State Department of Social Services respectfully moves the Court, pursuant to Rule 16, to dismiss this appeal on the ground that appellant has failed to raise a substantial federal question.

Opinions Below

The order of the Court of Appeals of the State of New York dismissing appellant's appeal *sua sponte* on April 29, 1976, on the ground that no substantial constitutional question was directly involved is reported at 39 N Y 2d 832. A copy of the order is reproduced as an appendix

herewith. The decision of the Appellate Division of the Supreme Court, First Department is reproduced at p. A-1 of the appellant's jurisdictional statement, and is reported at 49 A D 2d 843, 373 N.Y.S. 2d 604 (1975). The matter was transferred by the Supreme Court, New York County to the Appellate Division for disposition in the first instance pursuant to §§ 7803 and 7804(g) of the New York Civil Practice Law and Rules by order dated May 28, 1974.

Jurisdiction

The order of the Court of Appeals was issued on April 29, 1976. Appellant's undated Notice of Appeal to this Court was received by the Attorney General's office on or about July 26, 1976.* Appellant has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

Question Presented

Whether the denial of payment by the local authorities to appellant of asserted [but actually unproved] Christian Science Nursing Services because they fall within the class of unlicensed services which are excluded from compensation is to be overruled because of asserted effect on the exercise of the First Amendment?

Statement of the Case

On May 28, 1974, appellant commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules seeking to annul a determination dated February 20, 1974 (A-16-18)** by appellee State Commissioner

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* Appellant's notice of appeal has not been filed with the Clerk of the New York County Supreme Court, as required by NYCPLR § 5515, and by this Court's Rule 10, subdivision 3.

** Reference is to appendix to appellant's jurisdictional statement.

of Social Services after a statutory hearing, which affirmed a decision of the New York City Department of Social Services denying appellant's request for the payment of claimed cost of Christian Science nursing care.

Appellant, an adult who lives as a recluse in the St. George Hotel in Brooklyn (H.M. 3)* is a recipient of public assistance. She claims to be a follower of the beliefs of Christian Science, although not a member of the Christian Science Church (A-14) and chooses not to avail herself of the services of physicians and registered nurses. Here, she claims to have been treated by a "Christian Science nurse", the asserted cost of whose services appellant wishes to have paid by Medicaid.

Allegedly because of her reclusive habits, appellant did not appear at the hearing requested by her nor did she want a home hearing which was offered (H.M. 3). The only testimony on her behalf was given by her attorney, the counsel below and on this appeal. There was no actual proof of the rendition of any nursing services other than her attorney's attempt to buttress the claim by his own assertions.

In the Determination After Hearing, dated February 20, 1974, appellee State Commissioner affirmed the agency's determination denying payment for the services of a Christian Science nurse on the ground that the Social Services Law and Departmental Regulations make no provision for such payment for services by an unlicensee, without determining the question as to whether such alleged services were rendered and were necessary.

The Appellate Division held that the request for payment of the cost of Christian Science nursing care was properly denied. That Court held that:

> "Aside from the fact that a Christian Science nurse is not classified as a registered nurse (Education

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* Reference is to minutes of hearing held December 18, 1974.

Law § 6901 et seq.), petitioner has not demonstrated that she is entitled to payments pursuant to Social Services Law § 365-a, since there is insufficient in the record to indicate either the nature of her illness or of the treatment which she received." (A-4).

A notice of appeal to the New York Court of Appeals on constitutional grounds was dismissed by that Court *sua sponte* on the ground that no substantial constitutional question was directly involved.

ARGUMENT

There is no merit in the assertion that the State is required upon religious grounds to pay for "Christian Science" nursing care.

The Medical Assistance program under which appellant sought payment for the services of a Christian Science nurse is administered by the State and partially funded by the Federal Government. The Social Security Act and federal regulations provide for Federal financial participation in payment for Christian Science nursing care only if permitted by state law, 42 U.S.C. 1396d(a)(1)(17); 45 C.F.R. § 249.10(b)(15)(iii). Section 365-a, subdivision 2(d) of the New York Social Services Law provides that payment for nursing services may be made only if the services had been given by or under the supervision of a registered nurse. Under Article 139 of the Education Law (§ 6901, et seq.), a Christian Science nurse (unless qualified as prescribed in § 6904) is not a registered nurse. Thus, appellee State Commissioner correctly held that appellant was not entitled to the payment sought under both the federal and state statutory provisions.

There is no rational support for the appellant's argument that New York is required to include Christian Science nursing care in the range of services offered to

medicaid recipients when Federal statute and regulation provides that the State has the option not to do so. Indeed, appellant never challenged this statute and regulation below.

The New York Education Law provides strict standards for the licensing of health care professionals, including nurses. See Education Law, Articles 131, 131A, 132, 133, 139, 141 and 143. The restriction of state funds available for medical assistance to those providers of medical services who are licensed, or are supervised by licensed professionals, is an appropriate and reasonable expression of public policy. The Education Law does not prohibit the activities of self-styled Christian Science nurses, Education Law § 6907, subd. 1(g). Appellant incorrectly argues, however, that the language of the statute exempting Christian Science nurses from licensing means the State "recognizes" them thus bringing them within the ambit of the Federal regulations (Jurisdictional Statement p. 10). Exemption from licensing and regulation is not the legal equivalent of being licensed and regulated. Payment for services in question has properly been denied because the Christian Science nurse's care falls within the class of unlicensed nursing services which are excluded from medicaid compensation simply because not regulated.

The State has a firm right to marshal its resources in such a way as it concludes will provide the most qualified treatment within the limit of such resources. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). The denial of compensation is in line with this policy of the State and is a consequence of the unlicensed and unregulated status of the Christian Science nurses involved in this case and is not based on any action, direct or indirect, against the use of prayer as a theraputic agency. To authorize compensation would accord Christian Science practice a preference over other practices of the healing arts. The State's position is absolutely neutral. Any Christian Scientist

who qualifies as a registered nurse is in no wise prohibited from the use of prayer.

The right of the State to oversee all professions concerned with health and to set up educational requirements and proficiency tests is well established. *Robinson* v. *California,* 370 U.S. 660, 664 (1962); *Barsky* v. *Board of Regents,* 347 U.S. 442, 449 (1954); *Dent* v. *West Virginia,* 129 U.S. 114, 123-25 (1889); *Graves* v. *Minnesota,* 272 U.S. 425, 428-29 (1926). This includes the right to establish professional standards the practitioner must meet in order to come within the category of services qualified for reimbursement under the Medicaid program. *American Physicians & Surgeons* v. *Matthews,* 395 F. Supp. 125 (N.D. Ill., 1975), *aff'd.* —— U.S. ——, 96 S. Ct. 388, citing *Rasulis* v. *Weinberger,* 502 F. 2d 1006 (7th Cir. 1974).

Obviously, *Sherbert* v. *Verner,* 374 U.S. 398 (1963), has no application here. Belief in Christian Science has no relevance or impact on the ability to obtain a professional license by showing the educational qualifications and proficiency stipulated in the Education Law, which is a reasonable condition set up by the State in order to entitle it to reimbursement under the Medicaid program. The State's interest in insuring the possession of such qualifications as a condition to entitlement to reimbursement is clearly sufficient to sustain this limitation. *Johnson* v. *Robinson,* 415 U.S. 361, 94 S. Ct. 1160 (1974). The State court was fully warranted in concluding that there was no substantial constitutional question raised by appellant.

CONCLUSION

This appeal should be dismissed for want of a substantial federal question.

Dated: New York, New York, September 15, 1976.

Respectfully submitted,

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APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of April A. D. 1976

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

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1 Mo. No. 457 SSD 34
Miriam Winters,

Appellant,

vs.

The Commissioner of the New York State Department of Social Services and the Commissioner of the New York City Department of Social Services, Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the Appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-81

MIRIAM WINTERS,

Appellant,

- against -

THE COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK, and THE COMMISSIONER OF NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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OTHER AUTHORITIES

ARGUMENT

Appellees, apparently overwhelmed by the Constitutional arguments presented in this case, have attempted to answer by implicitly dropping one-half of the Appellate Division's reasoning for rejection of Medicaid reimbursement and attempted, in support of the other half, to retreat into the irrelevant and narrow issue of licensing regulations. Appellees apparently would not support the claim that rejection is justified by alleging there is "insufficient in the record to indicate the nature of her illness or the treatment she received."1/

1/ There is an oblique reference to this surrender in the suggestion that there was no "actual proof of the rendition of nursing services,""...and only testimony...by her attorney." This is, of course, false. A-12 and A-13 reproduce copies of the bills submitted. Her affidavit is found at A-14 through A-15. The affidavits, bills, etc., which were accepted by the hearing officer were

Reason and Constitutional Law, on the other hand, will not support the "licensing" defense already discussed in detail in Appellant's Jurisdictional Statement. It is too frail a straw to carry the weight of Constitutional evasion.

i. Cases

Appellees, for case support, rely primarily on two cases. Johnson v. Robinson, 415 U.S. 361 (1974) is their main reference but, that case is not on

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fn. 1/ continued

actual and sufficient proof.

Other factual errors in appellees' brief include the discussion of the Notice of Appeal on page 2. The New York CPLR section does not refer to the requirements of appeals to the United States Supreme Court and Court Rule 10, subdivision 3, directs appellant to file the Notice of Appeal in the court where the record is held, which in this case, was the Court of Appeals--the traditional place for filing such Notice of Appeal. See, e.g., In Re Richard S., 32 NY2d 592, 347 NYS2d 54 (1973). The Notice of Appeal was accompanied by a dated affidavit of service.

point. The rationale for excluding religious conscientious objectors from Veterans Education Benefits was that "Congress' classification [was rational in] limiting educational benefits to military service veterans as a means of helping them readjust to civilian life. Alternative-service performers are not required to leave civilian life to perform their services." at 381-2. In addition, there was a State interest in establishing a militia already acknowledged in Gillette v. U.S., 401 U.S. 437 (1971). Here, we do not have a statute designed to forward some State interest but, instead, one which dispenses individual benefits. The recipients are all in the same position, rather than being divided into (a) religious people already granted an exemption on religious grounds which had prevented deprivation; and (b) those who served without that exemption

and were now receiving assistance in order to rectify the deprivation they suffered by their non-exempted service.

The other case mainly relied on, Dandridge v. Williams, 397 U.S. 471 (1970) dealt not with denial of benefits to people exercising Constitutional rights but rather the limiting of the amount of money given to individuals in various categories. Courts will not interfere with legislative calculation of budgets but they must prevent administrative exclusion from benefits on unconstitutional grounds.

ii. Licensing and Labeling

As pointed out in the Jurisdictional Statement, recipients of medical assistance have a "free choice of providers," 18 N.Y.C.R.R. 360.29, 45 C.F.R. 249.10(b)(15)(ii). As also pointed out in the Jurisdictional Statement, here and in

the companion case (that we asked to be joined) there are "unlicensed" individuals who are reimbursed. Moreover, Christian Science nurses are specifically exempted from "licensing." It is, therefore, irrelevant under what label the Christian Science nurse applies. Under the Constitutional compulsion to read statutes and not to reach Constitutional issues, payment for Christian Science nurses should be reimbursed as "nurses." If not under that category, then as the Jurisdiction Statement indicates, payment can be reimbursed from a whole range of other possible authorities.2/

2/ Appellee says appellant "never challenged this statute and regulation indicated below," without specifying which statute and regulation is at issue. If this statute cannot be construed to include payment to Christian Science nurses, of course, as Point II of the Jurisdictional Statement, pp. 14-18 argues, §365-a would be unconstitutional.

iii. Healing, Prayer, and Payment

It should be noted that appellee attempts to characterize Christian Science treatment as only "prayer." But, Christian Science nursing treatment often includes other activities than prayer, as indicated by this record itself below, involving the use of means of comfort and utilization of comforting substances. This perpetual attempt to characterize Christian Science healing as only "religious" and, therefore, not appropriate for Medicaid reimbursement is the gravamen of the case. As Miriam Winters' affidavit makes clear, her recourse to Christian Science treatment helped her. "I became healed." (A-14.) She paid her bills for this healing and was refused reimbursement. Yet, the federal statute recognizes the efficacy of Christian Science treatment. The Internal Revenue Service allows

medical deduction for Christian Science treatments (see, e.g., 433 CCH 6175, 1976 CCH Federal Tax Reporter, 25,100 ¶2019.11) and the statute can clearly be seen to authorize their payment.

CONCLUSION

For the foregoing reasons, appellees' motion to dismiss should be denied in all respects.

Respectfully submitted,

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